

No. 15264

United States Court of Appeals
For the Ninth Circuit

ORION SHIPPING AND TRADING COMPANY, a Corporation,
and PACIFIC CARGO CARRIERS CORPORATION,
Appellants,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANTS

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
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BRIEF OF APPELLANTS

STATEMENT OF JURISDICTION

Willie B. Basnight, a crew member of the S.S. SEACORONET, filed a civil action in United States District Court for the Eastern District of Pennsylvania against Orion Shipping & Trading Company and Pacific Cargo Carriers Corporation, owners and operators of the vessel, for injuries received aboard the vessel on August 17, 1953. The cause was transferred to the United States District Court for the Western District of Washington, Northern Division. The defendants then instituted a third party action against the United States of America with a claim for recovery over against the Government for any amounts the defendants might be required to pay Willie B. Basnight.

The case came on regularly for trial before the

Honorable John C. Bowen. A verdict was rendered by the jury on behalf of Willie B. Basnight and against Orion Shipping & Trading Company and Pacific Cargo Carriers Corporation and a judgment entered thereon. The trial court dismissed the third party complaint against the United States of America and denied a motion to transfer the said third party action to a different venue. The defendants appealed from the judgment in favor of Willie B. Basnight and also appealed from the judgment of dismissal of the third party action and the order denying the motion to transfer the cause. Subsequently the judgment in favor of Willie B. Basnight and against Orion Shipping & Trading Company and Pacific Cargo Carriers Corporation was satisfied and the appeal thereon was dismissed. Appellant Orion Shipping & Trading Company and Pacific Cargo Carriers Corporation prosecutes this appeal from the judgment of dismissal of the third party action and the order denying the motion to transfer the same.

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court of the main cause of action of *Basnight v. Orion, et al.*, is conferred by the provisions of Title 28 U.S.C.A. 1332. The jurisdiction of the District Court with reference to the third party cause of action is conferred by the Suits in Admiralty Act, 46 U.S.C.A. §§741-752. For the jurisdiction of the District Court of the third party action on the *civil* side see *Skupski v. Western Navigation Company*, 113 F.Supp. 726 (D.C.S.D.N.Y. 1953). In that case the vessel was owned and operated by the defend-

ant third party plaintiff, and was time chartered to the United States. In an action by the widow of a longshoreman accidentally killed aboard the vessel, the vessel owner impleaded the United States under the Federal Torts Act. The government moved against the third party complaint on the ground that a remedy was available under the Suits in Admiralty Act and that therefore the Torts Act (28 USCA 2680(d)) precluded the application of the Torts Act. The court decided as follows (p. 727):

“Without indulging in jurisprudential semantics, it seems clear that the sovereign consent to be sued manifested in the Federal Tort Claims Act includes impleading the United States. *United States v. Yellow Cab Co.*, 340 U.S. 543, 71 S.Ct. 399, 95 L.Ed. 523. If it had been possible and had plaintiff maintained the parent action under the Suits in Admiralty Act, consent to sue the United States would have included its impleader in admiralty. *Hidalgo Steel Co. v. Moore & McCormack Co., Inc.*, D.C.S.D.N.Y., 298 F. 331; *The Cotati*, D.C.S.D.N.Y., 2 F.2d 394. The question presented—somewhat different in this case—is whether such impleader of the United States may take place when the parent action is one on the civil side and the right of such defendants against the sovereign is one of admiralty.

“We think that such impleader lies. In the words of Judge Cardozo, ‘No sensible reason can be imagined why the state, having consented to be sued, should thus paralyze the remedy.’ *Anderson v. John L. Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, quoted in *United States v. Yellow Cab Co.*, *supra*, 340 U.S. at page 554, 71 S.Ct. 399, 406. Third party practice has been designed

to assure disposition of disputes with common questions of law and fact in a single suit and not a multiplicity of them. That the remedy against the third-party defendant in the instant case may properly be sought in admiralty without jury, and—on the other hand—that against defendants is sought in a forum with jury, presents no insuperable barrier to pursuit of both in a single suit. After trial, the court might reserve to itself disposition of the controversy involved in the third-party complaint and leave to the jury issues of fact presented by the original complaint.

“Motion by the United States to dismiss the third-party complaint denied.”

The United States itself, as defendant in a Federal Torts Claim action, has impleaded a third party in a *civil* action for a *maritime* claim and has succeeded in taking such action over the objection of the third party defendant that the third party complaint did not constitute a good cause of action on the *civil* side in view of the occurrence having been maritime in nature. See *Russell Poling & Company v. United States*, 140 F.S. 890 (U.S.D.C. S.D. N.Y. 1956). This was an action by plaintiff on the civil side under the Federal Tort Claims Act. The United States impleaded a third party defendant. The court found that both the principal and the third party claim were maritime in nature and stated that the fact that the suit was pending on the law side rather than the admiralty side of the court did not deprive the third party defendant from asserting its claim for a division of damages as a substantive right. The court stated (p. 893):

“The trier of the fact may well find that the

damage caused the plaintiffs' barge was due to common fault — negligent towage by Conners (third party defendant) and negligence of United States of America with respect to the proper maintenance of the light buoys. Since under applicable admiralty law, Conners, if found to be in fault with United States of America, may be called upon to exonerate the latter for one-half of the damages, it was properly brought in as a third party defendant under Rule 14 (a)."

The same court held similarly in *Canale v. American Export Lines*, 17 F.R.D. 269 (U.S.D.C. S.D. N.Y. 1955). Judge Kaufman stated (p. 270) :

"The crucial issue posed is whether a third party complaint may be brought in admiralty when plaintiff's action against the defendant is one of law. While the question is not free from difficulty, this court holds in the affirmative."

The court states that what is essentially at issue is the extent to which an admiralty cause triable without a jury and civil actions at law with trial by jury may be joined for the purposes of a single suit. The court states that the separation of the fact finding functions of the jury and the trial judge in such a case does not lead to confusion and has consistently been effectuated in cases where issues of law are tried to a jury and issues of an equitable nature in the same case tried by a court alone. This is the precise procedure employed by the trial court in the case at bar (Tr. 51, 52). Judge Kaufman then proceeded to review the cases including those from the Second and Third Circuits in which maritime causes of action were heard by the courts in conjunction with actions on the law side of the court,

such as for example Jones Act cases at law being tried together with maintenance and cure cases in admiralty. See *Civil v. Waterman S. S. Corp.*, 217 F.(2d) 94, 97 (C.A. 2, 1954), and *Jordine v. Walling*, 185 F.(2d) 662 (C.A. 3, 1950). Further example of this authorization of joinder at law of a personal injury claim and a maritime cause of action is given by *McCarthy v. American Eastern Corp.*, 175 F.(2d) 724 (C.A. 3, 1949), wherein the court treated a claim based both on negligence and unseaworthiness. Judge Kaufman also quotes at length from the *Skupski* case, *supra*. In conclusion Judge Kaufman states (p. 273):

“It is in the interest of expedition and consistent with the spirit of modern pleading that artificial practice barriers be pierced.”

JURISDICTION OF THE COURT OF APPEALS

Jurisdiction of this Court is granted by the provisions of Title 28 U.S.C.A. §1291 which gives to the Courts of Appeal jurisdiction of all appeals from final decrees of District Courts.

STATEMENT OF THE CASE

On August 17, 1953, Willie B. Basnight was a member of the crew of the S. S. SEACORONET, owned and operated by Orion Shipping & Trading Company and Pacific Cargo Carriers Corporation. On that date the vessel was under time charter to United States of America and was in the course of cargo operations at the Army Port of Pusan, Korea. Army scrap metal parts were being loaded aboard the vessel among which were some presumably empty containers of chlorine

gas. During the course of the evening on that date chlorine gas began emanating from the hatch of the vessel as a result of which the plaintiff Basnight was exposed to the fumes and sustained certain alleged injuries.

Basnight filed a civil action against Orion Shipping & Trading Company and Pacific Cargo Carriers Corporation in the United States District Court for the Eastern District of Pennsylvania on September 20, 1954 (Tr. 3). This action was subsequently transferred to the United States District Court for the Western District of Washington, Northern Division. The defendants answered this complaint (Tr. 24) and on April 11, 1955, filed a third party complaint against United States of America praying for full indemnity against the United States for any recovery that would be had against Orion, *et al.*, by the plaintiff Basnight (Tr. 7). This third party complaint was based upon the Federal Torts Claims Act, the Suits in Admiralty Act and other applicable federal statutes.

On June 15, 1955, the United States of America filed a motion to dismiss the third party complaint on the ground that the court lacked jurisdiction under the Federal Torts Claims Act and the Suits in Admiralty Act, that the venue was improperly laid in the Western District of Washington, that the third party plaintiff did not reside in the district, that the act complained of did not occur in the district, that the cargo sought to be charged was not to be found in said district and that the complaint failed to state a cause of indemnity against the third party defendant (Tr. 12). Argument was had on this motion on September 19, 1955, and an

order denying the motion was entered on October 6, 1955 (Tr. 21). The United States of America then answered the third party complaint (Tr. 22).

At the trial of the cause which commenced on May 23, 1956, it was agreed that the court and not the jury would be the trier of the fact with respect to the claim for recovery over against the United States (Tr. 51, 52). The trial resulted in a verdict for the plaintiff against Orion, *et al.* (Tr. 31), from which the latter appealed to this court on July 17, 1956 (Tr. 33).

Arguments on the recovery over proceedings were had on July 27, 1956 (Tr. 56), as a result of which an order of dismissal without prejudice was entered on the same date (Tr. 34). The defendants and third party plaintiffs moved to vacate this decree of dismissal and for an order transferring the cause to the Southern District of New York (Tr. 36). In an oral opinion rendered from the bench the court denied these motions (Tr. 97). The defendants and third party plaintiffs thereupon, on September 7, 1956, filed notice of appeal to this court from the final judgment in the third party action entered on July 27, 1956, and from the order denying their motions for reconsideration and for the vacation of the decree of dismissal and from the order transferring the cause to New York entered on August 20, 1956 (Tr. 39).

The third party proceedings are reported at pages 56 through 97 of the transcript. The proceedings consisted principally of the beginning of an opening statement by counsel for the third party plaintiffs, extensive colloquy with the court on the Government's var-

ious objections, and an offer of proof made by counsel for the third party plaintiffs at page 92.

The decision of the court to dismiss the third party proceedings appears to be based on a finding that there was not contained within the third party complaint an allegation of the presence of the vessel in the jurisdiction during the pendency of the proceedings.

In order to succinctly present the questions involved and the manner in which they were raised, as required by the rules of this Court, it is deemed advisable to summarize the portion of the transcript referred to above, in chronological order:

1. United States Attorney stipulates that the S.S. SEACORONET was in a port in the jurisdiction of the court during the pendency of the action, said stipulation being subject to an objection on the grounds of irrelevancy and immateriality (Tr. 59, 66).

2. The court holds that the action for recovery over properly lies and that it is a proper suit insofar as venue is concerned (Tr. 75).

3. The court confirms that it has already ruled on the alleged lack of venue under the Suits in Admiralty Act, in favor of third party plaintiff (Tr. 76).

4. The court confirms that it has jurisdiction of the third party action against the United States (Tr. 78).

5. Third party plaintiffs move to amend the third party complaint to conform to proof that vessel was within district during pendency of action (Tr. 82).

6. United States Attorney confirms that his objection to proof of venue was based solely on irrelevancy and immateriality (Tr. 85 and again at Tr. 87).

7. The court sustains the objection of the United States to the trial amendment on venue.

8. The court announces that his ruling is without prejudice to the right of third party plaintiffs to sue United States in the proper district and in the proper venue (Tr. 91).

9. Third party plaintiffs make their offer of proof that the vessel was in the port during the pendency of the action (Tr. 92).

10. The United States' objection to the offer of proof made again on the grounds of irrelevancy and immateriality is sustained (Tr. 93).

11. Third party plaintiffs move under 28 U.S.C.A. §1406(a) that the matter be transferred to the Southern District of New York (Tr. 93).

12. The court states it will deny the motion to transfer (Tr. 95).

13. The court denies subsequent written motion made to transfer under 28 U.S.C.A. §1406(a) (Tr. 98).

From the foregoing it appears that the following questions are involved in this appeal:

1. Did the absence of an allegation of venue in the third party complaint render the same fatally defective.

2. If an allegation of venue in the third party complaint be deemed necessary, did the trial court abuse its discretion in sustaining the objection of the United States to the requested trial amendment.

3. Did the trial court abuse its discretion in refusing the appellant's offer of proof with respect to venue.

4. Did the trial court err in failing to treat the respondent's motion for dismissal as a motion to transfer to a proper venue.

5. Did the trial court abuse its discretion in denying the motion to transfer under the provisions of 28 U.S.C.A. §1406(a).

SPECIFICATION OF ASSIGNED ERRORS RELIED UPON

1. The district court erred in sustaining the objection to the trial amendment requested to make the pleadings conform to the proof with respect to venue.

2. The district court erred in sustaining the objection to the offer of proof concerning venue.

3. The district court erred in denying the motion to transfer the third party action under the provisions of 28 U.S.C.A. §1406(a).

4. The district court erred in dismissing the third party complaint on the ground of lack of venue.

ARGUMENT

I. No Necessity of Alleging Venue Under Suits in Admiralty.

Without referring to it initially as a requirement either of venue or of jurisdiction, the Suits in Admiralty Act, 46 U.S.C.A. §742 (2), provides in part:

“Such suits shall be brought in the District Court of the United States for the district in which the party so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. * * * Upon application of either

party the cause may, in the discretion of the court, be transferred to any other District Court of the United States.”

This Act was passed in 1920 and since that time there have been a myriad of trial court and appellate court decisions interpreting the provisions of this Act with particular respect as to whether the above portions of the Act refer to venue or to jurisdiction.

In 1946 Judge Kennedy of the Southern District of New York summarized the leading cases up to that date in *Sawyer v. United States*, 66 F.Supp. 271 (D.C.S.D. N.Y. 1946). Questions which the court sought to answer included whether the above quoted portions of the Suits in Admiralty Act indicated a limitation on jurisdiction over the subject matter or whether it merely defined venue and whether or not, if said provisions were held to concern venue, a respondent would waive an objection thereto by pleading to the merits when the libel itself was silent on the libelant's residence or place of business and on the location of the vessel involved. After reviewing at length some nine cases Judge Kennedy stated (p. 274) :

“I do not attempt to reconcile these cases. I regard them as irreconcilable.”

However, in 1948, this particular question was specifically and directly answered in *Hoiness v. United States*, 335 U.S. 297, 93 L.ed. 16. This was a libel in personam against the United States of America to recover insurance benefits, damages, wages and maintenance. In the report of the lower court proceedings, 75 F. Supp. 289 (D.C.N.D. Cal. 1947), it is stated (p. 291) :

“This libel does not allege that libelant has his

principal place of business within the court's jurisdiction, or that the vessel, at the commencement of the action, was found within this district. It is obvious, therefore, that the libel is fatally defective."

The lower court then dismissed the libel for lack of jurisdiction.

The appeal to the Court of Appeals for the Ninth Circuit, 165 F.(2d) 504 (C.A. 9 1947), was dismissed, as having been taken from a non-appealable order, and an appeal was then taken to the United States Supreme Court.

Mr. Justice Douglas, author of the United States Supreme Court decision on the appeal, noted that in spite of the absence of allegations of residence and of the location of the vessel, the United States had not appeared specially but had answered to the merits. He noted further that the District Court had raised the question of jurisdiction *sua sponte* and had dismissed the libel. The Supreme Court stated:

"II. The ruling of the District Court that the provisions of §2 of the Suits in Admiralty Act, directing where suit shall be brought, were jurisdictional, was in our view erroneous. Those provisions properly construed relate to venue. * * * Congress, by describing the district where the suit was to be brought, was not investing the federal courts 'with a general jurisdiction expressed in terms applicable alike to all of them.' See *Panama R. Co. v. Johnson*, *supra* (264 U.S. 384, 68 L.ed. 751, 44 S.Ct. 391). It was dealing with the convenience of the parties in suing or being sued at the designated places. * * * The residence or principal place of business of the libelant and the place where the

vessel or cargo is found may be the best measure of the convenience of the parties. But if the United States is willing to defend in a different place, we find nothing in the Act to prevent it.

“The judgment is reversed and the case is remanded to the district court for further proceedings in conformity with this opinion.”

Thus it appears that the presence or absence of allegations of residence and vessel location are not jurisdictional and that their absence alone does not justify a judgment of dismissal. Whereas in the *Hoiness* case, *supra*, the Government had not raised objection to the place of the trial (venue) nor had it made a motion to dismiss, in the case at bar the Government made a pre-trial motion to dismiss, alleging among other things the appellant's failure to allege facts showing proper venue both on the grounds of residence and the absence of the cargo sought to be charged.

If the trial court in the *Hoiness* case, *supra*, was in error in dismissing the libel, having raised the jurisdictional question *sua sponte*, so likewise was the trial court in error in the case at bar in dismissing the libel rather than accepting and ruling on the offer of proof of venue.

II. If the Allegations of Venue Were Essential to the Third Party Complaint, Did the Trial Court Abuse Its Discretion in Sustaining an Objection to the Appellant's Motion to Amend Its Complaint to Conform to the Proof, Since No Prejudice to Respondent Would Have Resulted from the Amendment.

While the appellant feels that the *Hoiness* case, *supra*, should dispose of all questions on this appeal,

the appellant, however, will now consider its other assignments of error.

The respondent made its original pre-trial motion to dismiss the third party complaint on June 15, 1955, in part upon the ground of failure to allege facts showing proper venue. An order denying this motion was entered on October 6, 1955, reserving to respondent herein leave on the trial of the cause to renew said motion. Thus respondent was forewarned of the possibility that at the trial of the cause the court would again deny its motion to dismiss even though the allegations of venue had not in the interim been added to the third party complaint. Respondent was bound to have knowledge that the appellant would be required to establish venue by presentation of testimony or other evidence at the trial and for the court to have permitted such amendment at the trial would have worked no hardship or surprise upon the respondent since said amendment was merely to conform the pleadings to the proof which at the time of the amendment had been submitted. This proof which was submitted prior to the motion to amend consisted of a stipulation by counsel for respondent that the vessel had entered the district during the pendency of the action (Tr. 59, 66). This stipulation was subject to the respondent's objection on the grounds of irrelevancy and immateriality. No objection was made to this evidence either upon the ground that it concerned matters not contained within the third party complaint, or that the United States would be prejudiced thereby. Furthermore, the granting of this requested amendment was required by the specific pro-

visions of the Federal Rules of Civil Procedure No. 15 (b) readings as follows:

“(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.”

What constitutes an “abuse of discretion” is difficult of exact definition, but such abuse would clearly appear to exist in this case, where no harm whatever results to the one party, and where the other party is out of court.

III. If Necessary to Allege Facts of Venue, Did the Trial Court Err in Refusing the Appellant's Offer of Proof.

As part of its case in chief, appellant called to the stand a witness who was prepared to testify that the vessel was within the jurisdiction of the court during

the pendency of the action (Tr. 92). The court directed that an offer of proof be made. The offer of proof established that the vessel had been in the district during the pendency of the action. The respondent objected to this offer on the grounds of irrelevancy and immateriality which objection was sustained (Tr. 93).

The element of venue is, of course, basic in any lawsuit and determines whether the litigant is entitled to continue his case in the particular court in question. The determination of the facts which establish venue are to be found in the pleadings, from the nature and place of the accident, the identity and location of the court, or from any evidence touching upon these facts developed during the trial. That evidence of a fact which would assist in the determination of venue is material, whether said fact is contained in the pleadings or not, is a proposition so fundamental that no cases on the point can be found. Thus it is clear that the Government's objection to the offer on the ground of immateriality should not have been sustained and the trial court erred in so doing.

IV. The District Court Erred in Denying the Appellants' Motion to Transfer.

Title 28 U.S.C.A. §1406(a) reads as follows:

“The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if be in the interest of justice, transfer such case to any district or division in which it could have been brought.”

The Suits in Admiralty Act (46 U.S.C.A. §742) under which this third party complaint was brought, states in part as follows:

“Upon application of either party, the cause may, in the discretion of the court, be transferred to any other district court of the United States.”

Appellant, toward the close of its case and following the announced intention of the court to enter an order dismissing the cause, orally made a motion to transfer under §1406(a) (Tr. 93). This motion was denied by the court (Tr. 94). Subsequently on August 3, 1956, the appellant filed a formal motion to vacate the decree of dismissal and for an order transferring the third party cause of action to the Southern District of New York (Tr. 36).

This motion was based upon the ground that such transfer was required “in the interest of justice” since a new action to be filed in the Southern District of New York, as suggested by the court, would have been time barred under a ruling of the Second Circuit which will be referred to below. This motion to vacate, etc., was argued before the trial court on August 20, 1956, and was denied in all respects.

Respondent can think of no better example of a transfer being made “in the interest of justice” than one where, but for such transfer, one of the litigants would be time barred in his claim against the other as is respondent in this case. In *Ryan Stevedoring v. United States of America*, 175 F.(2d) 490 (C.A. 2, 1949), the appellee, United States of America, in a third party claim brought against it under the Suits in Admiralty Act, pleaded the two-year statute of limitation under said Act, 46 U.S.C.A. §745. The third party plaintiff-appellant relied on the usual rule that a claim for indemnity accrues only for the purpose of limitation when

the indemnitee has been subjected to liability. The court reviewed the cases which had applied this general rule to an agent's claim for indemnity against the United States but distinguished those cases as being instances where the duty to indemnify a subordinate was clear, such as under a contract, and stated that they were *not* cases of the addition or substitution of an additional or sole tortfeasor. The court then stated (p. 494):

“An impleading petition against the United States should be dismissed where the bar of the statute obtains.”

Thus it is clear from the foregoing that the Second Circuit, upon the pleading by the United States of the bar of the statute of limitations, would dismiss any subsequent action filed by the appellant herein against the respondent in the Southern District of New York.

The trial court herein upon being advised of this rule of the Second Circuit and that therefore the claim of appellant would be time-barred clearly abused its discretion in overruling the appellants' motion to transfer.

In two subsequent district court decisions, it was pointed out that a transfer was the proper procedure under circumstances similar to those at bar. In *Falciani v. United States*, 87 F.Supp. 482 (D.C.E.D. Penn. 1949) Judge McGranery, in another Suit in Admiralty claim for personal injuries, stated as follows (p. 483):

“This is an action by a seaman, under the Suits in Admiralty Act, 46 U.S.C.A. §741, et seq., to recover for injuries sustained by him while he was a member of the crew of respondent's vessel. Two

years after filing its answer, respondent moves to dismiss the libel on the ground of improper venue. Inasmuch as the ground assigned does not relate to jurisdiction, *Hoiness v. United States*, 335 U.S. 297, 69 S.Ct. 70, the respondent concedes that his motion to dismiss must be treated as a motion to transfer. 28 U.S.C.A. §1406.”

The case of *Squires v. The Ionian Leader*, 100 F. Supp. 829 (U.S.D.C. N.J. 1951), is one of the few cases in which the United States was involved as a third party defendant as in the case at bar. The United States was impleaded in the case under the Suits In Admiralty Act following which the Government filed exceptions claiming that the petitioner was not a resident and that the vessel in question was not within the district. The court stated (p. 837):

“The objection is actually an objection to the ‘venue’ of the suit and not to the ‘jurisdiction’ of the court. The Act expressly provides that ‘* * * *’ It is our opinion that the jurisdictional requirements of the statute are present but that the venue of the suit is improperly laid. The petitioner does not maintain an office in this district and there is no evidence that the *The Farallon* was in this district at the time of the filing of the petition or at any time prior thereto.

“The objection to the venue of this suit must be sustained for the reason stated. It is our opinion, however, that the impleading petition should not be dismissed but that the case should be transferred to one of the two districts in which it could have been brought. 28 U.S.C.A. §1406 (a). We shall entertain a motion to transfer the case to a district convenient to the litigants.”

An application by the Second Circuit of the transfer provisions of §1406 (a) is to be found in *Orr v. United States*, 174 F.(2d) 577 (CA 2 1949). This was a Suits in Admiralty claim against the United States for personal injuries suffered by the libelant. An objection was raised by the United States to the venue and it was established on the trial that the elements of residence and the presence of the vessel were not present in the case. The lower court thereupon dismissed the suit. The Second Circuit stated (p. 579) :

“The libelant would lose a right of any substance only if the suit was dismissed (as it was here by the court below) and his claim in the meantime had become barred by the two-year statute of limitations. But §1406 of Title 28 U.S.C.A. preserves the suit by providing that: (citing 1406 (a)).”

The decree dismissing the libel was reversed and the cause was remanded to the District Court with directions to transfer the suit to a proper district pursuant to the above statute.

On a petition for rehearing the problem of the retroactive application of §1406(a) was raised. In deciding that this section could operate retroactively the court stated :

“The Revisor’s Note to §1406(a) says that that section ‘provides statutory sanction for transfer instead of dismissal, where venue is improperly laid.’ This comment on the scope of §1406(a) seems to point directly to the elimination of the bar of the statute of limitations in cases where jurisdiction exists and there is nothing to prevent its exercise but the lack of proper venue. Moreover, §1406 (a) on its face is applicable to the ‘district court

of a district in which is filed a case laying venue in the wrong division or district.' The case at bar is just such a case and §1406(a), which went into effect September 1, 1948, must be applied retroactively to a pending litigation where no valid judgment has been rendered prior to that date."

The case of *Untersinger v. U. S. A.*, 172 F.(2d) 298, 181 F.(2d) 953 (C.A. 2, 1949, 1950), not only treats the problem of transfer under §1406(a) but provides a logical answer to the problem herein raised as to whether or not it was initially necessary for the appellant to allege the facts of venue. The trial court found that the libelant under the Suits in Admiralty Act was not a resident of the district and that the merchant ship was not within the jurisdiction of the court. The libel was dismissed (75 F.Supp. 155). On appeal to the Second Circuit (172 F.(2d) 298) the court stated that the libel had contained no allegation as to residence or as to the whereabouts of the vessel. The court, referring to the *Hoiness* case, *supra*, held that these elements were referable to venue and were not jurisdictional. The court further decided that the contents of the answer filed by the United States had negatived its willingness to proceed, reserving its objections to venue, and that therefore there was no waiver. The court thereupon affirmed the decree of dismissal and stated as follows (p. 301):

"Accordingly the decree is affirmed, but with leave granted to the libelant, if he so desires, to apply within 30 days to the district court, under §1404 of Title 28 U.S.C.A., 1948 Revision, to transfer the action to any other district where it might have been brought. Whether that action is applicable to the present cause and whether the action

should be transferred are questions for the district court upon which we intimate no opinion.”

Accordingly the lower court vacated the dismissal and ordered the suit to be transferred (87 F.Supp. 532). This order was thereupon appealed again to the Second Circuit. In affirming this order of transfer the court stated (181 F.(2d) 953, 956) :

“Hence, §1406(a), as amended in 1949, gave power to the district court to vacate the dismissal and transfer the suit. The United States does not challenge the propriety of the transfer as matter of discretion; and it is difficult to see how anyone could do so. However, in what we have said, we do not mean to be understood as deciding more than that Judge Knox had jurisdiction to enter the order on appeal, if he thought that course to be ‘in the interest of justice.’ ”

The Second Circuit in *Warren v. United States*, 179 F.(2d) 919 (C.A. 2, 1949), made the following comment on the curing of a defect in venue (p. 920) :

“The libel against the United States was dismissed for improper venue. The libelant was not a resident of the Southern District of New York and when the libel was filed the vessel on which he had been employed was not within that district. Section 2 of the Suits in Admiralty Act, 46 U.S.C.A. 742, prescribes the venue for suits of this character. *Hoiness v. United States*, 335 U.S. 297, 69 S.Ct. 70. Plainly venue was lacking when the libel was filed, and the answer of United States pleaded this as a defense. At the trial, however, it was stipulated that the vessel was within the Southern District of New York during the pendency of the action. The libelant contends that this cured any defect of venue. We think he is right.”

The libel in *Preussler v. United States*, 102 F.Supp. 274 (U.S.D.C. S.D.N.Y. 1952) in a Suits in Admiralty Act action contained no allegation that the vessel would be within the district. In spite of this the court held that this defect in venue would be cured if the vessel came into the district during the pendency of the action. The court, however, following the argument of the respondent and the evidence that the possibility that the vessel would come into the port was very slight, held that this mere possibility did not support the venue. It is to be noted, however, that "in the interest of justice" the action was ordered transferred to the proper district in Florida where the libelant was a resident.

The Second Circuit in *Gill v. United States*, 184 F. (2d) 49 (C.A. 2, 1950), again ruled that the presence of the vessel during the pendency of the action corrected any defect in venue. The following comment by Judge Chase is of particular interest (p. 51):

"Accordingly, we do not find it necessary to decide whether, as the trial court held, the failure to press the point as to the alleged improper venue before beginning the trial on the merits taken together with the filing of the petition impleading the stevedoring company and the other circumstances here shown add up to waiver of defense based upon defective venue. We do wish to point out, however, the desirability of having such questions brought on for determination promptly and preferably in suitable pre-trial proceedings. By so doing effective and proper use may be made of 28 U.S.C.A. §1406(a)."

The latter comment points out precisely the harm and delay which has now occurred in the case at bar as a result of the action of the trial court, some eight

months before trial, in denying the respondent's motion to dismiss upon grounds of venue but in reserving to the respondent a right to renew the same motion at the time of trial. As handled in the *Squires* and *Falciani* cases, *supra*, the court should have treated the motion to dismiss as one for a change of venue if the appellant could not have established proper venue at the time of said argument. The third party proceedings could then have been held in the proper district following the termination of the main cause of action by the plaintiff against the appellant.

A Suits in Admiralty action against the United States was dismissed in *Podgorski v. United States*, 87 F.Supp. 731 (U.S.D.C. E. D. Penn. 1949), when the court determined from the admissions of the libelant on the argument of the motion to dismiss that venue did not lie either in terms of residence or the presence of the vessel. The court concluded that the Government had not waived its rights under the venue provisions and in the absence of appropriate compliance therewith by the libelant the libel was dismissed. The opinion reflects, however, that there were no allegations in the libel concerning the venue provisions but that the dismissal was based not on the absence of the allegations thereon but on the failure of proof thereof.

V. The District Court Erred in Dismissing the Third Party Complaint on the Ground of Lack of Venue.

In the foregoing the appellant has set forth authorities indicating that the trial court erred in rejecting the offer of proof on venue and in failing to permit a trial amendment alleging the proper venue.

An additional ground which was urged upon the court and which should have justified a finding of proper venue is that of the theory of ancillary jurisdiction and venue. A third party complaint is not an independent and original action. It is an ancillary proceeding incidental to the main action. The Tenth Circuit has so stated in *United States v. Acord*, 209 F.(2d) 709 (cert. den. 98 L.ed. 1115) as follows:

“It has been held that a proceeding on a third party plaintiff’s claim under Rule 14 is an ancillary proceeding incidental to the main action and that no separate ground of jurisdiction is required.”

As authority for the foregoing the court in a footnote cited cases from the Second and Tenth Circuits and from 14 District Courts.

In this same case, Chief Judge Phillips stated that jurisdiction of the ancillary proceeding is dependent on the jurisdiction of the court over the principal proceeding. He then proceeded to discuss the similar problem with reference to venue and concluded as follows (p. 714):

“(6) While the question is not free from doubt, we are of the opinion that the reasons which give the court jurisdiction over an ancillary proceeding by virtue of its jurisdiction over the principal action, likewise support the conclusion that venue in the ancillary proceeding may depend or rest upon the venue in the main proceeding.

“(7) Venue provisions are for the convenience of the parties. The granting or denial of leave of a defendant to prosecute a third-party proceeding under Rule 14 rests in the sound discretion of the trial court, and where an action on the third-party

claim could not be maintained as an original proceeding because of lack of proper venue, the court should deny leave to bring a third-party proceeding under Rule 14, if it will result in great inconvenience to the third-party defendant.

“(8) Here, the United States suffered no disadvantage or inconvenience by being required to defend the action in the western, rather than in the eastern district of Oklahoma.

“We conclude that the plea of improper venue was properly denied.”

At no point in the third party proceedings and the arguments thereon did the respondent claim disadvantage, inconvenience of witnesses or prejudice with respect to the claim of improper venue.

CONCLUSION

It is respectfully submitted that under the authorities hereinabove presented, the trial court should have decided as follows:

I. On Venue

1. It should have ruled that an allegation of venue was unnecessary, that venue had been proven, and it should have decided the third party claim on the merits.

2. If it felt that an allegation of venue was necessary it should have granted the appellant's motion to amend and it should then have concluded that venue had been established by the evidence.

3. It should have accepted the appellant's proof on venue, whether there was an allegation of venue in the third party complaint or not, and from the offer of proof should have concluded that proper venue existed.

II. On the Motion to Transfer

1. If the court found that venue had not been established it should have treated the Government's motion to dismiss as one to transfer the cause and should have granted such transfer.

or

2. The court should have granted the appellant's motion to transfer made at the close of the third party proceedings.

or

3. The court should have granted the appellant's motion to vacate the order of dismissal and to transfer the cause to the Southern District of New York.

Respectfully submitted,

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